No. 17-1307

In The Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP, ET AL.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* USFN – AMERICA'S MORTGAGE BANKING ATTORNEYS® IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

USFN – America's Mortgage Banking Attorneys® ("USFN") is a national, not-for-profit association of law firms that specialize in matters of real estate finance. Founded in 1988, USFN consists of organizations that represent the nation's largest banks, mortgage lenders, mortgage servicing companies and government sponsored enterprises (such as Fannie Mae and Freddie Mac) in connection with foreclosure, bankruptcy, loan modifications and other workouts, inventoried properties, and litigation related to these areas. Membership also includes industry-affiliated suppliers of products and services.

USFN was established to promote competent, professional, and ethical representation among its membership and for the mortgage servicing industry, and to represent the collective interests of its membership to the mortgage servicing industry. As part of its mission, USFN also supports the interests of its members and the mortgage servicing industry through education, political and governmental reform, and by encouraging the use of industry standard procedures, technologies, and best practices.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case, nor their counsel, authored this brief in whole or in part. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Each of the parties has filed a blanket consent in connection with potential *amicus curie* briefs, copies of which are on file in the Clerk's Office. Accordingly, this brief is submitted upon the consent of all parties.

Among the services and products offered to the mortgage servicing industry by USFN are focused educational seminars, state-by-state desk guides and matrices that address specific and relevant topics and issues, the National Mortgage Servicer's Reference Directory, which is a one-of-a-kind compendium of industry information, training materials and videos, and in-house staff training programs for mortgage servicing companies.

USFN has a particular interest in this matter because the core business of its membership is the enforcement of security interests through judicial and non-judicial foreclosures in all fifty states, the District of Columbia and Puerto Rico. The Court's decision in this matter will affect key business processes for many USFN members and, accordingly, will have a great impact on USFN, its members and the banking and mortgage servicing clients of those members.

SUMMARY OF ARGUMENT

The plain text and legislative history of the FDCPA make clear that non-judicial foreclosures are not "debt collection" covered by the Act. The circuit courts that have held to the contrary each have fatal flaws in their logic, while the Ninth and Tenth Circuit decisions – including the decision below – are sound.

Moreover, the position advocated by Petitioner overlooks the critical distinction between *in personam* acts to collect debt and *in rem* or *quasi in rem* acts that

are solely against the collateralized property. This distinction is well-recognized in the context of bankruptcy law, where personal debt collection is barred post-discharge, but lien enforcement is specifically permitted.

In that regard, courts have identified "pressure" to repay a debt as the litmus test for whether the creditor's action affected the debtor's personal liability within the meaning of the Bankruptcy Code. The inquiry is objective; the question is whether the creditor's conduct had the practical, concrete effect of coercing payment of a discharged debt. This has been dubbed by the Tenth Circuit as the "Objective-Coercion Principle." *See In re Paul*, 534 F.3d 1303, 1308-09 (10th Cir. 2008).

Notwithstanding Congress's significant concern that a discharged debtor get bankruptcy's intended "fresh start," lien enforcement against collateral post-discharge is specifically permitted because it is recognized as a separate and distinct remedy from efforts to collect from the debtor personally.

It is no coincidence that the same Congress (the 95th) enacted both the Bankruptcy Code and the FDCPA. The text and legislative history of the FDCPA demonstrate that Congress intended the same objective test about the exertion of pressure to repay a debt (which violates the discharge injunction and qualifies as debt collection under the FDCPA) as opposed to mere *in rem* lien enforcement (which is permitted

post-bankruptcy discharge and is not debt collection under the FDCPA).

When considering non-judicial foreclosures through this lens, it is clear that Congress intended the same bright line that separates a bankruptcy discharge injunction violation from permitted lien enforcement to apply as the dividing line between FDCPA-covered debt collection and non-covered lien enforcement. The Court should recognize this bright line.

Finally, the State of Colorado has a sovereign interest in governing Colorado foreclosures. The FDCPA should not be construed to frustrate that interest, which is exactly what adopting Petitioner's position would do. If the FDCPA were held to apply in connection with Colorado's non-judicial foreclosure scheme, it would create an irreconcilable conflict between federal and state law. The mutual exclusivity of the two statutes would make it impossible for creditors and their counsel to comply with both. Such a decision would only serve to expand into Colorado, and other non-judicial foreclosure states, the same conflicts, challenges, and increased lawsuits that law firms and practitioners in Michigan have experienced as a result of *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013). *See Amicus* Brief of Michigan Creditors Bar Association, pp. 6-10.

The court of appeals correctly decided this issue and its judgment should be affirmed.

ARGUMENT

Enforcing a security instrument through a non-judicial foreclosure is not "debt collection" under the FDCPA

The Ninth Circuit in *Vien-Phuong Thi Ho v. Recon-Trust Co., NA*, 858 F.3d 568 (9th Cir.), *cert. denied*, 138 S. Ct. 504 (2017), and the Tenth Circuit below, correctly determined that a trustee or law firm whose primary business is the enforcement mortgage liens through foreclosure – rather than the collection of money – is not a "debt collector" pursuant to the Fair Debt Collections Practices Act, 15 U.S.C. §1692 *et seq*. ("FDCPA" or "the Act"). Consequently, the Ninth and Tenth Circuits concluded that non-judicial foreclosures are not "debt collection" subject to the FDCPA.

These decisions were correct and the Tenth Circuit should be affirmed for various reasons. First, the plain language of the statute dictates that result. *Ho*, 858 F.3d at 571-575; Pet. App. 5a-10a; Resp. Br. 16-24.

Additionally, to the extent the Court looks beyond the statutory text to examine Congressional intent through the legislative history, it is compelling that the law that was ultimately enacted was a compromise bill that specifically rejected the interpretation that Petitioner urges. Resp. Br. 25-27. It is further compelling that Congress discussed thirteen states that did not have debt collection regimes, which clearly indicates that mortgage foreclosures were not being contemplated because all fifty states have foreclosure statutes. Resp. Br. 26-27.

Contrary to the Ninth and Tenth Circuits, the Second, Third, Fourth and Sixth Circuits have all broadly held that foreclosures are "debt collection" under the Act, law firms and trustees pursuing such foreclosure are "debt collectors", and, as a result, are subject to the FDCPA. *See Cohen v. Rosicki, Rosicki & Associates, P.C.*, 897 F.3d 75 (2d Cir. 2018); *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013). Each of these decisions is flawed for various reasons, and none can withstand appropriate scrutiny in the face of the plain language of the statute.

In *Wilson*, the Fourth Circuit held that "foreclosure is a method of collecting a debt" and that holding to the contrary "would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt." *Wilson*, 443 F.3d at 376. The Ninth Circuit's criticism of *Wilson* in *Ho* is well-founded insofar as the *Wilson* Court inserted its own policy view to avoid a perceived "loophole" rather than follow the actual text of the statute, which demands a different result. *Ho*, 858 F.3d at 572.

In *Cohen*, the Second Circuit determined that because the mortgagor has redemption rights in connection with foreclosure under New York law, and the mortgagee can later seek a deficiency judgment post-foreclosure, the "purpose of foreclosure is to obtain payment on the underlying loan, rather than mere

possession of the subject property." *Id.* This decision is flawed both because the court did no analysis as to whether the law firm defendant is a "debt collector" and because it looks to what might happen in the future (*i.e.*, redemption or a deficiency action) rather than what the specific acts or actions were at the time the FDCPA was allegedly violated. *Cohen*, 897 F.3d at 83. If the alleged violation occurred in the context of a foreclosure that did not include a demand for payment or deficiency judgment, it is merely the enforcement of a lien and not debt collection.

In *Glazer*, the Fourth Circuit held that "every mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the house at auction, and applying the proceedings from the sale to pay down the outstanding debt)." *Glazer*, 704 F.3d at 461 (emphasis in original).

In *Kaymark*, the Third Circuit conducted no analysis into the "principal purpose" of the law firm defendant's business, but instead erroneously presumed it was a debt collector under to section 1692a(6). *See* generally, *Kaymark*, *supra*, 783 F.3d 168. However, pursuant to the plain language of the referenced section, "any business the principal purpose of which is the enforcement of security interests" is only a debt collector for purposes of section 1692f(6), which section is irrelevant to mortgage foreclosures. Rooted in that faulty premise, the remainder of the decision loses vitality.

Ultimately, each of these decisions are flawed either because they fail to give justice to the plain language of the statute, render statutory language superfluous or because they substitute their own policy views for those of Congress. On the other hand, the statutory interpretations of the Ninth and Tenth Circuits follow the statute's plain language, render no text superfluous, and make the most sense in connection with the legislative history.

In addition to the aforesaid textual and legislative arguments, there are two additional policy bases that support affirming the court below: 1) the distinction between *in personam* debt collection and *in rem* lien enforcement (including, by analogy, the application of that distinction in bankruptcy law); and 2) the right of Colorado to decide upon a foreclosure scheme without federal interference.

I. The well-established distinction between *in personam* debt collection and *in rem* lien enforcement is entrenched in bankruptcy law

There are various ways a secured creditor may enforce its rights when a debtor defaults in making payments, the primary two being *in personam* collection against the debtor and *in rem* or *quasi in rem* collection through liquidation of collateral. Perhaps nowhere in the law is this distinction more visible than in the bankruptcy context, specifically post-discharge.

The discharge of debt in a bankruptcy proceeding "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor."[2] 11 U.S.C. § 524(a)(2); *In re McLean*, 794 F.3d 1313, 1320 (11th Cir. 2015).

Notwithstanding a discharge of personal liability pursuant to 11 U.S.C. § 727, the right of a secured creditor to proceed against collateral *in rem* survives the discharge. *Johnson v. Home State Bank*, 501 U.S. 78, 80 (1991); *Long v. Bullard*, 117 U.S. 617, 620 (1886). *See also* 11 U.S.C. § 524(j).

> The creditor's surviving right to foreclose on the mortgage can be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Thus, a bankruptcy discharge extinguishes only one mode of enforcing a claim – an in personam action – while leaving intact another – an in rem action.

Johnson v. Home State Bank, 501 U.S. at 78-79.

In this regard, the Bankruptcy Code[3] and case law interpreting it recognize the difference between debt collection, which would violate the discharge injunction provided for in 11 U.S.C. § 524, and lien enforcement, which is permitted post-discharge. The discharge injunction only applies to attempts to collect or recover

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[2] This is commonly referred to as the "discharge injunction."

[3] The Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 *et seq.*, is commonly referred to as the "Bankruptcy Code."

"any such debt *as a personal liability of the debtor.*'" *McLean*, 794 F.3d at 1320, quoting 11 U.S.C. § 524(a)(2) (emphasis in original).

"Given its important role in achieving the Bankruptcy Code's overall policy aim of giving a debtor a 'fresh start,' § 524(a)(2) (the discharge injunction) is an expansive provision that is sensitive to the diversity of ways a creditor might seek to collect a discharged debt." *McLean*, 794 F.3d at 1321; citing *In re Hardy*, 97 F.3d 1384, 1388-89 (11th Cir. 1996).

In *McLean*, the Eleventh Circuit determined that the fundamental underpinning of the discharge injunction is whether the debtor feels "pressured in any way to repay" a discharged debt.

> Legislative history demonstrates clearly that the purpose of the statute is to "eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts." H.R. Rep. No. 95-595, at 365-66 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6321. And Congress meant no doubt whatsoever: "[Section 524] is intended to insure that once a debt is discharged, *the debtor will not be pressured in any way to repay it*. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that." *Id.* at 366 (emphasis added). Incorporating this language into their decisions, other circuits have identified "pressure" to repay a debt as the litmus test for whether the action affected the debtor's personal liability within the meaning of § 524(a)(2). *See Solow v. Kalikow (In re Kalikow)*, 602 F.3d

> 82, 96 (2d Cir. 2010) ("[The creditors'] contact with [a third party] in no way 'pressured' [the debtor] to repay any of the discharged debts."); *Paul v. Iglehart (In re Paul)*, 534 F.3d 1303, 1313 (10th Cir. 2008).

McLean, 794 F.3d at 1321-22 (emphasis in original). That said, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.") *McLean*, 794 F.3d at 1322, citing *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992) (collecting cases from other circuits).

The inquiry is objective; the question is whether the creditor's conduct had the practical, concrete effect of coercing payment of a discharged debt. This has been dubbed by the Tenth Circuit as the "Objective-Coercion Principle." *See Paul*, 534 F.3d at 1308-09. Notwithstanding Congress's significant concern that a discharged debtor get bankruptcy's intended "fresh start," lien enforcement against collateral post-discharge is specifically permitted because it is recognized as separate and distinct from efforts to collect from the debtor personally.

In other words, even in a statutory scheme so concerned with "pressure" on a debtor to repay debt, the Bankruptcy Code intentionally permits foreclosure post-discharge and does not consider foreclosure to exert pressure on a debtor to personally repay the debt. Instead, it recognizes that foreclosure is merely the pursuit of *in rem* relief solely against the property and, in the pursuit of that *in rem* relief, "contact with

the Debtor is not per se prohibited by the discharge injunction. Rather, demands for payment of discharged debts are prohibited." *Best v. Nationstar Mortgage LLC*, 540 B.R. 1, 10 (B.A.P. 1st Cir. 2015); quoting *In re Brown*, 481 B.R. 351, 358 n. 10 (Bankr. W.D. Pa. 2012).

In *Best*, the Bankruptcy Appellate Panel for the First Circuit observed that "[w]hen a secured creditor retains a lien on the debtor's property after the discharge, courts have held that it is not *per se* improper for the secured creditor to contact a debtor to send payment coupons, determine whether payments will be made on the secured debt, or inform the debtor of a possible foreclosure or repossession, as long as it is clear the creditor is not attempting to collect the debt as a personal liability." *Best*, 540 B.R. at 10-11; quoting *In re Culpepper*, 481 B.R. 650, 658 (Bankr. D. Or. 2012) (citing 4 *Collier on Bankruptcy* ¶ 524.02[2][b]).

"Statements of an informational nature, even if they include a payoff amount, are not generally actionable if they do not demand payment." *Best*, 540 B.R. at 11; citing *Brown*, 481 B.R. at 359 (general informational letters that included a payoff amount but did not demand payment were not violations of the discharge injunction) (citing cases). And when the statements indicate they are for informational purposes only, "[e]ven a hypothetical unsophisticated consumer should understand after reading these disclaimers that the monthly statements are not demands for payment. *In re Lemieux*, 520 B.R. 361, 366 (Bankr. D. Mass. 2014).

Through this comparison of the FDCPA and the Bankruptcy Code, it becomes clear that Congress intended the FDCPA to apply only to *in personam* collections that would be barred by the discharge injunction in bankruptcy, but not *in rem* or *quasi in rem* foreclosure actions that would not be barred post-bankruptcy discharge. In other words, the same bright line that separates violations of the discharge injunction from permitted post-discharge lien enforcement also separates debt collection covered by the FDCPA from lien enforcement that is not covered.[4]

It is worth noting that the Bankruptcy Code (enacted November 6, 1978) and the FDCPA (enacted September 20, 1977) were both the product of the 95th Congress and enacted less than 14 months apart. It is unrealistic to think that Congress so clearly determined that foreclosure is neither the collection of debt personally nor an exertion of pressure upon a debtor to pay for purposes of the Bankruptcy Code, if it was not already that same Congress's view that lien enforcement is different than debt collection for purposes of the FDCPA. Rather, "Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts." *Farina v. Nokia Inc.*, 625 F.3d 97, 112 (3d Cir. 2010).

Adoption of the Petitioner's logic – that every foreclosure is tantamount to a demand for payment –

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[4] *See* 1a, *infra*, a chart created by *amicus* to assist in visualization of the bright line that Congress intended.

would mean that every foreclosure post-bankruptcy discharge violates the discharge injunction. Obviously, this is not the case because well-settled law specifically allows for foreclosure actions to be brought post-bankruptcy discharge, and courts have rejected the notion that foreclosure in-and-of itself constitutes a demand for payment of money from the debtor. *See, e.g.*, *McLean*, 794 F.3d at 1321–22.

Further contrary to Petitioner's position, the required Colorado foreclosure notices cannot objectively be said to coerce payment. While they may occasionally lead to payment at the debtor's initiative, the notices are not sent for the purpose of eliciting such payment. Rather, these notices are informational only, *see Best, supra*, 540 B.R. at 11; citing *Brown*, 481 B.R. at 359, designed to inform the mortgagor of the impending foreclosure occasioned by the default.

Moreover, Petitioner's criticism of the Ninth Circuit, *see* Pet. Br. 20, that it does not matter whether the money is coming from the consumer or the property, is misplaced in light of the bankruptcy discharge scenario. Rather, it absolutely matters where the money is coming from. If the money is sought from the consumer it violates the discharge injunction. However, if the money would only be coming out of liquidation of the property, it does not. Similarly, for FDCPA purposes, the Act only applies when collection is sought from the consumer personally, and not solely from collateralized property.

Accordingly, the more sound logic – which is supported both in the text of the FDCPA and upon consideration of the legislative history – is the recognition of a bright line between acts and actions that seek to hold a consumer personally liable for a debt and those that merely seek to enforce a lien on collateral. This case, and the current circuit split, illustrate that a bright line is preferable. Because of the legal concepts surrounding bankruptcy and the discharge injunction, and given the text and history of the FDCPA, it is evident that Congress intended the bright line to be that the Act does not apply to acts or actions that are permitted post-bankruptcy discharge.

A. The Court should recognize the bright-line distinction between debt collection and lien enforcement that Congress intended

Both the text and legislative history of the FDCPA make clear that Congress never intended the Act to apply in connection with the mere enforcement of a security instrument. The bright-line distinction between acts and actions that solely seek enforcement of a security instrument versus the pursuit of other debt collection remedies (*i.e.*, suit on note, foreclosure that includes demand for payment or any other payment demand, foreclosure that also seeks combined money judgment, post-foreclosure deficiency action) has never been specifically annunciated by the Court, although it is supported by the statutory text and legislative history. *See* pp. 5-8, *supra*.

Not coincidentally, this bright line mirrors remedies that are permitted under bankruptcy law post-discharge. Because a suit on note, foreclosure that includes demand for payment (or any other demand for payment), foreclosure that also seeks combined money judgment and a separate post-foreclosure deficiency action all have an aspect of personal debt collection, each is barred by the discharge injunction. However, the mere enforcement of a pre-petition security instrument, with no other collection efforts, is specifically permitted post-bankruptcy discharge.

We do not ask the Court to *create* a bright line – Congress has already done that. Rather, we urge the Court to recognize that bright line in the way that Congress intended. By doing so, lower courts, consumers, foreclosure and bankruptcy practitioners, banks and mortgage servicing companies will all have a clear understanding that the same bright line that applies post-bankruptcy in connection with the discharge injunction applies to foreclosures under the FDCPA. Where the action is merely to foreclose the security interest, with no personal collection efforts or exposure, the activity is lien enforcement and not debt collection, and therefore not covered by the FDCPA.

B. Petitioner also overlooks the related distinction between the note evidencing the debt and the security instrument that provides collateral

The primary instruments that memorialize a residential mortgage loan – the promissory note and the deed of trust[6] securing such a note – are two separate instruments, each providing distinct obligations of a mortgagor and different remedies upon default. *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir. 2013) ("courts have 'rejected the argument that a note and its security are inseparable by recognizing that the note and the deed-of-trust lien afford distinct remedies on separate obligations'"); *see also* 55 Am. Jur. 2d Mortgages § 463 (a security interest in property and the underlying debt it secures are not the same).

A suit for breach of a promissory note is an action *in personam*, by which "the creditor seeks to recover money from the debtor." *United States v. Begin*, 160 F.3d 1319, 1321 (11th Cir. 1998), citing *United States v. Alvarado*, 5 F.3d 1425, 1428 (11th Cir. 1993). Conversely, the non-judicial enforcement of a security instrument does not involve attempts to collect money.

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[6] In non-judicial foreclosure states, the security instrument is usually referred to as a "deed of trust" or "security deed" while judicial foreclosure states typically refer to the instrument by its traditional name, "mortgage." While there are technical distinctions between a deed of trust, security deed and a mortgage, those distinctions are not relevant for our purposes, and thus we use the phrases interchangeably to describe a voluntary lien granted to secure repayment of a mortgage loan.

Rather, the mere enforcement of a security instrument securing real property is instead an action *in rem*,[6] seeking liquidation of the collateral through the transfer of title. *See Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) ("a bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam* – while leaving intact another – namely, an action against the debtor *in rem*."). *See* pp. 8-15, *supra*.

A foreclosure that does not seek a combined money judgment[7] therefore affords relief only as to the secured property, not as to the mortgagor. *ABN AMRO*

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[6] As opposed to purely "*in rem*" some states consider their mortgage foreclosures to be "*quasi in rem*" because personal service of process is required and/or because a right to seek a deficiency on the note may survive the foreclosure. *See, e.g., Turczak v. First Am. Bank & Lebow*, 997 N.E.2d 996, 1002 (Ill. App. Ct. 2013) ("while *in rem* differs from *quasi in rem*, both are alternatives to *in personam* jurisdiction. Foreclosure suits on property, a *quasi in rem* proceeding, applies a legally distinct remedy from an *in personam* proceeding on a promissory note"). However, the mere right to later or separately seek a deficiency judgment does not transmorph the foreclosure action itself into debt collection, which is the flaw in the Second Circuit's *Cohen* decision. *See* pp. 6-7, *supra*. For purposes of this brief, we use the phrases "*in rem*" and "*quasi in rem*" interchangeably, both meaning a foreclosure action against the property only that does not seek a money judgment; and both *in rem* and *quasi in rem* meaning not *in personam*.

[7] In some states, judicial foreclosure allows the creditor to seek either the sale of the collateral only or a combined judgment that directs sale of the collateral and simultaneously awards a money judgment. *See, e.g.*, Fla. Stat. § 702.06. We acknowledge that certain types of judicial foreclosure (*i.e.*, those where payment of money or a deficiency judgment is sought) may qualify as debt collection.

Mortg. Group, Inc. v. McGahan, 237 Ill. 2d 526, 534-537 (2010). "A judgment of foreclosure is a judgment *in rem* or *quasi in rem* that directs the sale of the mortgaged property to satisfy the mortgagee's lien." [internal citations omitted] *Aluia v. Dyck-O'Neal, Inc.*, 205 So. 3d 768, 773 (Fla. Ct. App. 2d 2016). Such a foreclosure is not, and cannot be properly characterized as an *in personam* action against a person to collect a debt.[8]

Accordingly, the Petitioner's logic is consistently flawed because it overlooks the distinction between the note and the mortgage, the difference between the pursuit of *in rem* and *in personam* remedies, and, consequently, the bright line separating debt collection and lien enforcement.

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[8] While most foreclosures result from a monetary default, many also result from non-monetary defaults, which further illustrates the distinction between personal debt collection on the note and mere lien enforcement. Examples of non-monetary defaults include: providing materially false, misleading or inaccurate information in connection with the loan application process, default on a senior lien that could impair the creditor's lien, failure to pay taxes or homeowners' association dues, failure to maintain hazard or flood insurance, and the existence of any civil or criminal forfeiture action that could impair the creditor's interest. *See* relevant portions of Fannie Mae/Freddie Mac Uniform Colorado Deed of Trust, 12a. Non-monetary defaults give rise to the same exact remedy as a monetary default, namely, non-judicial foreclosure of the property – additional demonstration that non-judicial foreclosure has nothing to do with the collection of money.

II. The FDCPA should not be construed to interfere with state regulation of foreclosures

Foreclosure is an inherently state court matter. To apply the FDCPA to the Colorado foreclosure process would preempt a foreclosure process developed by the state without clear legislative intent to do so. *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). Providing clear title to real property and therefore allowing the free transfer of real property is a critical state law concern. As the Court has previously stated: " 'the general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the very nature of [state] government.' " *Id. at 544, citing American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911).

The Colorado state foreclosure process, if correctly followed, provides clear title upon issuance of the Public Trustee's Deed to the successful bidder at the foreclosure sale or the redeeming party. *See, e.g.*, Colo. Rev. Stat. §§ 38-38-501 and 504.

If the FDCPA is held applicable to non-judicial foreclosure processes, and portions of such processes are therefore determined to violate the FDCPA, states would be left with two equally unacceptable options to enforce *in rem* rights.[9] While the Colorado process has some FDCPA protections built in due to the fact that

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[9] This is the same conflict that our colleagues from the Michigan Creditors Bar Association described in their *amicus* brief about the impact of the Sixth Circuit's *Glazer* decision to the Michigan foreclosure practice.

the trustee is a public official and therefore has government immunity,[10] Colorado is the only state which uses the public trustee system. All other non-judicial foreclosure states use "private" trustees and would therefore not offer the same governmental or quasi-governmental immunity. If the FDCPA is held to apply to trustee foreclosures, the states would be left with two equally unacceptable options. The first requires the state legislatures to re-write state law to remove critical debtor protections and notices to third parties who are directly affected by the foreclosure. The second is to permit non-judicial foreclosures to proceed with the understanding that the trustee, trustee's attorneys, the creditor, and the creditor's attorneys are exposing themselves to liability under the FDCPA.

If the FDCPA is held applicable to non-judicial foreclosure processes, and portions of such processes are therefore determined to violate the FDCPA, state legislatures across the country would be required to amend their foreclosure laws to remove all notices and publications to third parties and all notices to the debtor once the debtor has obtained counsel or requests that the creditor cease and desist from further communication. 15 U.S.C. § 1692c(b) and §1692c(a)(2). These notices are intended to provide debtors with information regarding their options to avoid foreclosure as well as their rights with regard to the foreclosure. *See, e.g.*, Colo. Rev. Stat. §§ 38-38-102.5, 103, 103.1, 104, and Colo. R. Civ. P. 120. Certain of these notices are

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[10] *See* Colorado Governmental Immunity Act, Colo. Rev. Stat. §§ 24-10-101 *et seq*.

also intended to protect the rights of others including secured creditors, such as homeowner's associations, junior mortgage holders and judgment creditors. *See, e.g.*, Colo. Rev. Stat. §§ 38-38-102, 103, 104-106. A holding that the FDCPA is applicable to non-judicial foreclosures would invalidate significant portions of the well-established non-judicial foreclosure process in Colorado and many other states, a prospect that is deeply troubling.

Alternatively, states may elect not to amend their foreclosure laws, which would expose attorneys and trustees to FDCPA violations merely for electing to use their state's non-judicial foreclosure process. This would require, for example, third-party communications regarding the underlying debt secured by the property, a violation of the FDCPA.[11] This places them in a quintessential "Catch-22" between complying with conflicting state and federal laws, each of which is intended to protect consumers. This raises an especially difficult issue in Colorado, where the foreclosing entity is a public official. The state would be unable to proceed with its Public Trustee foreclosure system in light of clear conflicts with federal law.

Both of these options would also have another unintended but grave consequence. To the extent Colorado, and other states, determine that their state law

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[11] This is the current situation in Colorado as evidenced in the underlying case. In attempting to comply with both state law and the FDCPA, the attorneys placed themselves at risk of litigation brought by debtors arguing that the notices required by state law violate the FDCPA.

processes violate the FDCPA, creditors would be forced to seek *in rem* relief through the court system using the judicial foreclosure process as an alternative to the non-judicial process. The courts in non-judicial states would be overrun with judicial foreclosures, for which the states are not prepared and ill-equipped to handle.

There exists an inherent conflict between the FDCPA and Colorado foreclosure law

The FDCPA bars several types of communication that are in direct conflict with the Colorado foreclosure process.[12] Examples include the FDCPA's bar on communication with third parties by debt collectors "in connection with the collection of any debt," 15 U.S.C. § 1692c(b), as well as any direct communication "in connection with the collection of any debt" with a debtor who is represented by counsel. 15 U.S.C. § 1692c(a). Further, a debt collector must cease communication "if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer" 15 U.S.C. § 1692c(c).[13]

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[12] *See* 2a-11a for ten individual examples of direct conflicts between the FDCPA and Colorado foreclosure requirements.

[13] 15 U.S.C. § 1692c(c) provides limited exceptions to the requirement that communication must cease, including (1) to advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

Colorado foreclosure law is at odds with the FDCPA because state law requires in several instances not only communication with the debtor, but also, communication with third parties regarding the foreclosure. If a non-judicial foreclosure is considered to be debt collection, then various state-mandated communications regarding the non-judicial foreclosure would be in conflict with the FDCPA and each communication would be in violation of 15 U.S.C. § 1692c.

1. Pre-Commencement

Colorado's foreclosure statutes require two notices be sent to the debtor pre-foreclosure. The first notice provides the debtor with the telephone number of the Colorado foreclosure hotline, the direct telephone number of the creditor's loss mitigation representative and a statement that it is illegal for a foreclosure consultant to charge an up-front fee or deposit to the debtor for services related to the foreclosure. Colo. Rev. Stat. § 38-38-102.5(2). This first step in the foreclosure process is typically completed by the holder or servicer of the indebtedness. The requirement that this letter be sent is intended to assist the debtor in avoiding foreclosure. In some instances, as in this case, the statutorily required letter is sent by the attorney for the creditor.

A second notice is required to be sent by the servicer, providing the debtor with contact information for a designated single point of contact whose primary purpose is to provide loss mitigation information to the

debtor and coordinate loss mitigation efforts between the debtor and the servicer.[14] Colo. Rev. Stat. § 38-38-103.1. This step is also intended to assist the debtor in avoiding foreclosure.

If non-judicial foreclosures are considered to be debt collection, each of these statutorily required communications would be in violation of 15 U.S.C. § 1692c(a) and § 1692c(c) in the instances where the debtor is known to have counsel or has requested that the creditor cease communication. While the purpose and intent of the FDCPA and the Colorado foreclosure statutes are aligned insofar as both intend to protect consumers, federal preemption of a state statute designed to provide information regarding foreclosure prevention frustrates that purpose.

2. Commencement, Notices and Publication

Following the pre-foreclosure notices, to commence a Colorado non-judicial foreclosure, the creditor or its attorney must send a package ("PT Package") to the Public Trustee in the county where the property is located. The Public Trustee uses the information and forms in the package to communicate with the debtor and all necessary parties regarding the impending foreclosure. One of the forms included in the PT Package is the Notice of Election and Demand ("NED") which includes information necessary to identify the

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[14] Small servicers are exempt from this requirement. Colo. Rev. Stat. § 38-38-103.1(3).

creditor and the debtor, the principal amount of the debt underlying the secured claim, and the nature of the default under the security instrument, and the Property to be foreclosed. Colo. Rev. Stat. §§ 38-38-101(1) and (4). The information in the NED is required to be disclosed to third parties through publication and mailing, as set forth below.

The PT Package also includes a combined notice ("Combined Notice"). In addition to other information, the Combined Notice includes everything in the NED, along with the place, date, and time set for the foreclosure sale. The PT Package includes a mailing list ("Mailing List") compiled from real property records and the creditor's own records. Colo. Rev. Stat. §§ 38-38-101(d) and 104. The Mailing List includes all persons or entities with a recorded interest in the property as of the time the PT Package is prepared, as well as all addresses for the debtors and their successors in interest that are in the holder's records. *Id.* The Public Trustee is required to send the Combined Notice to all parties on the Mailing List and to publish a version of it, as set forth below.

Upon receipt of the PT Package, the Public Trustee must review the documents, and if complete, record the NED in the office of the county clerk and recorder. Colo. Rev. Stat. § 38-38-102. At the time of recording the NED, the Public Trustee sets the first scheduled foreclosure sale date. Recording the NED is the first act by the Public Trustee to communicate with the debtor and third parties regarding the impending foreclosure.

The act of recording the NED in the public records conflicts directly with the language of 15 U.S.C. § 1692c(b).[15] The purpose of recording the NED in the real property records is to provide notice to all interested parties of the impending foreclosure with specific details as to the debtor, the underlying debt and the nature of the default.

Within twenty (20) calendar days of recording the NED, the Public Trustee must mail the Combined Notice to all persons and entities on the Mailing List. Colo. Rev. Stat. § 38-38-103(1)(a). The Combined Notice includes all of the information in the NED as well as information regarding rights to cure or redeem the debt. It also must include the time, date and place of sale and a statement regarding the debtor's right to pursue legal action if the debtor believes there have been certain improprieties in the foreclosure process. Colo. Rev. Stat. §§ 38-38-103(1)(a) and (4). This is another required act of communicating specific information regarding the foreclosure action to the debtor and third parties.

The requirement to mail the Combined Notice to all parties on the Mailing List conflicts directly with the provisions of 15 U.S.C. §§ 1692c(a), (b) and (c).

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[15] Because the Public Trustee is a state official, the trustee arguably falls into an FDCPA exception. However, the "public trustee" concept is unique to Colorado, and the act of recording required notices in all other non-judicial foreclosure states would violate 15 U.S.C. § 1692c(b), if it is found to apply.

Next, prior to the first scheduled foreclosure sale date, the Public Trustee must publish in a newspaper of general circulation a shortened version of the Combined Notice[16] for four weeks. Colo. Rev. Stat. § 38-38-103(5). This publication is another act in direct conflict with the provisions of 15 U.S.C. § 1692c(b).

Once the foreclosure is commenced through the Public Trustee, the Public Trustee handles all aspects of the foreclosure except the Rule 120 proceeding described below. The Public Trustee performs all of the following related to the foreclosure sale: providing cure and redemption figures upon request, accepting pre-sale funds for cure and payoff, setting and continuing sale dates, conducting the foreclosure sale, accepting bids at sale, and managing post-sale redemption rights and funds. Colo. Rev. Stat. §§ 38-38-102-505. The Public Trustee communicates with the debtor, junior lienholders, and any other interested parties regarding the extent of the defaulted debt triggering the right to foreclose and the foreclosure process.

Each act necessary to commence the foreclosure conflicts directly with FDCPA requirements prohibiting contact with third parties and prohibiting direct communication with the debtor if he or she is represented by counsel or has requested a cease in communication. From a policy perspective, if non-judicial

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[16] The published Combined Notice is somewhat shorter as it removes the intent to cure and redeem language and also removes the statement regarding the debtor's rights to file a complaint with the Bureau of Financial Consumer Protection or the Colorado Attorney General.

foreclosures are held to be governed by the FDCPA, the existing foreclosure system in Colorado would cease to operate. All of the notices required to inform the debtors and other interested parties of the critical information regarding the foreclosure, and their rights in relationship to the foreclosure, would be prohibited.

3. Order Authorizing Sale

The Colorado non-judicial foreclosure process requires that the creditor receive an order from the district court authorizing the Public Trustee to conduct the non-judicial foreclosure sale. Colo. Rev. Stat. § 38-38-105. The order is obtained through an expedited process pursuant to Colorado Rule of Civil Procedure 120 ("Rule 120") which requires that the creditor provide notice of the hearing to all parties "whose interest in the real property may otherwise be affected by the foreclosure" Colo. R. Civ. P. 120(a)(1)(B)(v). The notice must contain a description of the deed of trust being foreclosed as well as the facts asserted in the motion to support the claim of default. Colo. R. Civ. P. 120 (b)(1). In addition to mailing the Rule 120 notice of hearing to all parties whose interests may be affected by the foreclosure, Colo. R. Civ. P. 120(b)(4)(A), the notice is posted at the courthouse. Colo. R. Civ. P. 120(b)(4)(B). A copy of the notice must also be posted in a conspicuous place on the subject property. Colo. R. Civ. P. 120(b)(4)(C).[17]

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[17] Colo. R. Civ. P. 120(b)(4)(C) applies to only foreclosures of residential real property.

The requirements of Rule 120 are in direct conflict with FDCPA communication restrictions. The notice of hearing must provide the factual basis for the assertion of the claim of default, yet the FDCPA prohibits communication with third parties about the debt without the written permission of the consumer. The notice is posted at the property and the courthouse for potentially anyone to read. The Rule 120 process was specifically designed to provide additional protections to the debtor by providing due process before the foreclosure of his or her property and to ensure that appropriate public notice is given. However, if non-judicial foreclosures are determined to be collection of debt, it would be impossible to process any foreclosure without directly violating the FDCPA. The FDCPA and Rule 120 cannot be read in concert.

Additionally, the FDCPA prohibits communication with a debtor who is represented by counsel. 15 U.S.C. § 1692c(a)(2). Colorado law specifically requires notice of the Rule 120 motion to be mailed to the grantor of the deed of trust and the current owner of the property. The notice is also required to be posted conspicuously on the subject property. Colo. R. Civ. P. 120 *supra*. Both of these requirements are in direct conflict with the FDCPA prohibition of communicating with the consumer if that consumer is represented by counsel. Again, the two statutes cannot be read in harmony. If preemption resolves the conflict, then the non-judicial foreclosure process in Colorado – and many, if not all other non-judicial states – would become extinct. Failure to comply with Rule 120 results in denial of the

order authorizing sale, which, in turn, means that the Public Trustee cannot conduct the non-judicial foreclosure sale. Colo. Rev. Stat. § 38-38-105. Thus, in order to comply with the FDCPA, the Colorado foreclosure process cannot be maintained, and would need to be replaced either by new legislation or a purely judicial foreclosure process.

4. The Sale

Forty-eight hours prior to sale, the foreclosing creditor must submit its credit bid to the Public Trustee, who is required to post for public viewing the bid and any amended bids. Colo. Rev. Stat. § 38-38-106. The publication of the bid provides to any interested party the information necessary to competitively bid at sale. Publication of the bid also benefits the debtor by increasing the likelihood of competitive bidding at sale. Any increase in the amount received at foreclosure sale decreases the potential deficiency that could be collected by the creditor in a separate action on the note.

Following the sale, the Public Trustee issues and records a certificate of purchase identifying the successful bidder at the foreclosure sale. After all redemption rights have expired, the Public Trustee issues and records a Public Trustee's Deed transferring title to the new owner of the Property. This is the final act of public communication regarding the foreclosure performed by the Public Trustee. The Public Trustee's Deed identifies the default that caused the foreclosure

and the amount paid at foreclosure sale for the property, as well as the new owner of the property.

The one power the Public Trustee does not have is the power to render a judgment on the debt owing by the debtor. Any action on the debt must be conducted through a separate judicial action. The Public Trustee can only provide *in rem* relief by issuing a deed to the successful bidder at sale or the last redeeming party. Accordingly, Colorado's non-judicial foreclosure process is not debt collection governed by the FDCPA. To hold otherwise would invalidate Colorado law, contrary to broad policy considerations supporting each state's autonomy to control property rights. *BFP*, 511 U.S. at 544.

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The plain text and legislative history of the FDCPA, along with various policy considerations, make clear that non-judicial foreclosures are not "debt collection" covered by the Act. Nor are law firms or trustees whose principal purpose is pursuing such foreclosures "debt collectors" under the FDCPA.

The Court should resolve the current circuit split by recognizing the bright line between personal debt collection and mere lien enforcement. This is what Congress intended in connection with the FDCPA, and already well-accepted in the post-bankruptcy discharge context. The judgment of the court of appeals should be affirmed.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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